FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 30 1938
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528.

UTAH FUEL COMPANY, ET AL., *Petitioners*,

v.

NATIONAL BITUMINOUS COAL COMMISSION, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., AS AMICI CURIAE.

CLARENCE A. MILLER,
Counsel for
Aberdeen and Rockfiish Railroad Company, et al.,
As Amici Curiae;
Office and Post-Office Address:
1120 Tower Building,
1405 K Street, N. W.,
Washington, D. C.

December 30, 1938.

INDEX

Page

I. Preliminary Statement 1

II. Statement of the Case 2

III. The Issues 3

IV. Summary of Argument 3

V. The Argument 4

1. The Bill of Complaint for Injunction and Petition for Declaratory Judgment, as Filed in the District Court, is Essentially an Action to Review a Preliminary, Procedural Order of the National Bituminous Coal Commission, and Such Order is Not Reviewable, Directly or Indirectly 4

2. The Case of Shields v. The Utah Idaho Central Railroad Company (No. 28, October Term, 1938, Decided December 5, 1938) is Distinguishable from the Present Case 5

3. The Remedy Provided by Section 6 (b) of the Bituminous Coal Act of 1937 to Persons Aggrieved by Its Operation is Exclusive 7

4. The Bituminous Coal Act of 1937 Should be so Construed as to Avoid Doubts as to Its Constitutionality 7

5. If the Bituminous Coal Act of 1937 be Ambiguous, Doubts Should be Resolved in Favor of Its Construction by the National Bituminous Coal Commission, the Administrative Agency Charged with Its Enforcement 8

6. The Bituminous Coal Act of 1937 Cannot be Administered Consonant with Well Established Principles of Constitutional Law If the Injunction Prayed for by Petitioners is Granted 8

Page

A.—The Statutory Duty of the Coal Commission 8
B.—The Necessity for a Hearing 9
C.—The Constitutional Requirements of a Fair Hearing 10

7. Congress Had Power to Authorize the Coal Commission to Make Public at a Hearing the Individual Verified Cost Reports of Producers of Bituminous Coal 13

8. Congress Authorized the Coal Commission to Disclose the Individual Verified Cost Reports of Bituminous Coal Producers at a Public Hearing 14

9. Petitioners Have No Such Property Rights in Cost Reports Filed with the Coal Commission as May Be Protected by Injunction 15

VI. Conclusion 17

APPENDIX

List of Railroads for which this brief is filed 18

TABLE OF AUTHORITIES CITED

CASES—

American Book Co. v. *Baltimore & Ohio R. Co.*, 179 I. C. C. 650 11
American Sumatra Tobacco Corporation v. *Securities and Exchange Commission*, 93 F. (2d) 236, 241, 68 App. D. C. 77, 82 .....5, 7, 16
Carter v. *Carter Coal Co.*, 298 U. S. 238..... 14
Chicago, M. & St. P. Ry. Co. v. *Minnesota*, 134 U. S. 418 10
Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541 16
Federal Power Commission v. *Metropolitan Edison Company*, 304 U. S. 375 5
Harriman v. *Interstate Commerce Commission*, 211 U. S. 407 7
Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88 .....10, 11
Jones v. *Securities and Exchange Commission*, 79 F. (2d) 617 ..... 5, 7

Page

McCaughn v. *Hershey Chocolate Company*, 283 U. S. 488 8
Mallory Coal Company, et al. v. *National Bituminous Coal Commission*, 99 F. (2d) 399 4
Monacacy Broadcasting Co. v. *Prall*, 90 F. (2d) 421 4
Morgan v. *United States*—I, 298 U. S. 468 11
Morgan v. *United States*—II, 304 U. S. 23 11
National Labor Relations Board v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1 7
Norwegian Nitrogen Products Company v. *United States*, 288 U. S. 294 ..... 13, 16
Norwegian Nitrogen Products Company v. *U. S. Tariff Commission*, 6 F. (2d) 491 16
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292 11
Procter & Gamble Co. v. *Coe*, (U. S. Ct. App. D. C.) 96 F. (2d) 518 16
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 11
Saxton Coal Mining Company v. *National Bituminous Coal Commission*, and allied cases, 96 F. (2d) 517 12
Securities and Exchange Commission v. *Andrews*, 88 F. (2d) 441 ..... 5, 7
Shannahan v. *United States*, 303 U. S. 596 6
Shields v. *The Utah Idaho Central R. R. Co.* (No. 28, 6 U. S. Law Week 423-425) 2, 3, 5
Smith v. *Interstate Commerce Commission*, 245 U. S. 33 16
Southern Ry. Co. v. *Virginia*, 290 U. S. 190 10
Spring City Foundry Co. v. *Commissioner of Internal Revenue*, 292 U. S. 182 8
Sykes v. *Jenny Wren Co.*, 78 F. (2d) 729, 64 App. D. C. 379 ..... 5, 7
United States v. *Abilene & Southern Ry. Co.*, 265 U. S. 274 11
United States v. *Baltimore & Ohio S. W. Ry. Co.*, 266 U. S. 14 10
United States v. *Illinois Central R. Co.*, 244 U. S. 82 .. 5, 6
United States ex rel Chicago Great Western R. R. Co. v. *Interstate Commerce Commission*, 294 U. S. 50, rehearing denied, 294 U. S. 731 16

Page

United States ex rel Kansas City Southern Ry. v. *Intersiate Commerce Commission*, 98 F. (2d) 268 16
Wichita Railroad & Light Co. v. *P. U. Comm. of Kansas*, 260 U. S. 48, 50 ..... 10, 11
Wilson v. *United States*, 221 U. S. 361 16

MISCELLANEOUS—

Bituminous Coal Act of 1935 14
Bituminous Coal Act of 1937 1
Note, 29 L. R. A. (N. S.) 716 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 528.

UTAH FUEL COMPANY, ET AL., *Petitioners,*

v.

NATIONAL BITUMINOUS COAL COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF OF ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., AS AMICI CURIAE.

I.

PRELIMINARY STATEMENT.

The Aberdeen and Rockfish Railroad Company, and the other railroads named in Appendix A, attached hereto, for whose account this brief *amici curiae* is filed, are common carriers by railroad, and are large consumers of bituminous coal from mines subject to the Bituminous Coal Act of 1937 (50 Stat. 72, U. S. C. Title 15, §§ 828-851), hereinafter referred to as the Coal Act, and to the regulation of the Na-

tional Bituminous Coal Commission, hereinafter referred to as the Coal Commission, and, therefore, have a direct and vital economic interest in the proper interpretation and application of the Coal Act, and have a direct interest in this proceeding because of its possible ultimate effect upon the establishment of minimum prices of railroad locomotive fuel coal by the Coal Commission. They, therefore, through counsel, and with the consent of the parties to this proceeding, submit this brief for the consideration of the Court.

II.

STATEMENT OF THE CASE.

This case is before this Court on writ of certiorari to the United States Court of Appeals for the District of Columbia to review a decision of that Court of December 5, 1938, affirming the judgment of the District Court of the United States for the District of Columbia, dismissing Petitioners' bill of complaint for injunction and petition for declaratory judgment, and denying a motion for temporary injunction (R. 29). The opinion of the United States Court of Appeals for the District of Columbia is printed in full in the record at pages 23 to 28.

Petitioners urge that the United States Court of Appeals for the District of Columbia erred:

1. In holding hat the District Court was without jurisdiction to enjoin the Respondents from taking the action which they propose to take.

2. In failing to hold, on petition for rehearing, that its opinion is in conflict with the opinion of this Court, also rendered on December 5, 1938, in No. 28—*Shields* v. *The Utah Idaho Central Railroad Company* (6 U. S. Law Week 423-425).

3. In failing to hold that the action which Respondents are threatening to take is specifically prohibited by the provisions of the Bituminous Coal Act of 1937.

III.

THE ISSUES.

The issues in the case are not entirely clear. The case seems susceptible to the view that there is a single issue involved, namely: whether the action is, in essence, one to review a preliminary and procedural order of an administrative tribunal. On the other hand, it is possible to take the view that since the District Court dismissed the bill of complaint upon its merits, the case will here be reviewed upon the merits. It is also possible to view the issues as being both procedural and substantive, and it is in that light that the argument herein is presented.

IV.

SUMMARY OF ARGUMENT.

1. The bill of complaint for injunction and petition for declaratory judgment, as filed in the District Court, is essentially an action to review a preliminary, procedural order of the National Bituminous Coal Commission, and such order is not reviewable, directly or indirectly.

2. The case of *Shields* v. *The Utah Idaho Central Railroad Company* (No. 28, October Term, 1938, decided December 5, 1938) is distinguishable from the present case.

3. The remedy provided by Section 6 (b) of the Bituminous Coal Act of 1937 to persons aggrieved by its operation is exclusive.

4. The Bituminous Coal Act of 1937 should be so construed as to avoid doubts as to its constitutionality.

5. If the Bituminous Coal Act of 1937 be ambiguous, doubts should be resolved in favor of its construction by the National Bituminous Coal Commission, the administrative agency charged with its enforcement.

6. The Bituminous Coal Act of 1937 cannot be administered consonant with well established principles of constitutional law if the injunction prayed for by Petitioners is granted.

7. Congress had power to authorize the Coal Commission to make public at a hearing the individual verified cost reports of producers of bituminous coal.

8. Congress authorized the Coal Commission to disclose the individual verified cost reports of bituminous coal producers at a public hearing.

9. Petitioners have no such property rights in cost reports filed with the Coal Commission as may be protected by injunction.

V.

THE ARGUMENT.

1. The Bill of Complaint for Injunction and Petition for Declaratory Judgment, as Filed in the District Court, is Essentially an Action to Review a Preliminary, Procedural Order of the National Bituminous Coal Commission, and Such Order is Not Reviewable, Directly or Indirectly.

What Petitioners are in fact seeking to do is to prevent the Coal Commission from introducing in evidence, or making available for inspection by interested parties of record in proceedings being conducted by the Commission, the cost and sales realization data filed by them with the Commission, pursuant to and in conformity with a ruling of the Commission of March 30, 1938. The United States Court of Appeals for the District of Columbia, in *Mallory Coal Company, et al.*, v. *National Bituminous Coal Commission* (99 F. (2d) 399), held this ruling to be a preliminary or procedural order, and not subject to judicial review. The petition in the *Mallory Case* was filed pursuant to Section 6 (b) of the Coal Act, and followed the statutory review

provided for by the Act. The coal producers failing to obtain a judicial review of this preliminary or procedural order or ruling, through another group of producers, brought this proceeding in the District Court of the United States for an injunction and declaratory judgment, seeking by this method to obtain a judicial review of this preliminary or procedural ruling of the Coal Commission, which had been held in the *Mallory Case* not to be judicially reviewable. This is, therefore, a proceeding attempting to substitute an injunction suit for a statutory method of review, or, in other words, to obtain indirectly what has been denied them directly.

It is suggested to the Court that the decision of the United States Court of Appeals for the District of Columbia in the *Mallory Case* is consistent with the decisions of this Court in *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, and *United States* v. *Illinois Central R. Co.*, 244 U. S. 82. It is also suggested that Petitioners cannot here substitute injunctive relief for the statutory appeal provided by the Coal Act. *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, 385; *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission*, 93 F. (2d) 236, 241, 68 App. D. C. 77, 82; *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441; *Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729, 64 App. D. C. 379; *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617.

2. The case of Shields v. The Utah Idaho Central Railroad Company (No. 28, October Term, 1938, Decided December 5, 1938) is Distinguishable from the Present Case.

Petitioners urge that the decision of the United States Court of Appeals for the District of Columbia in the instant case is contrary to and inconsistent with the decision of this Court in *Shields* v. *The Utah Idaho Central Railroad Company*, decided the same day (December 5, 1938). It is

suggested that the *Shields Case* is distinguishable from the present case. The *Shields Case* arose by reason of a determination of the Interstate Commerce Commission that the Utah Idaho Central Railroad Company is not an "interurban" electric railway, and, therefore, not exempt from the provisions of the Railway Labor Act. This Court, in *Shannahan* v. *United States*, 303 U. S. 596, held such "determinations" of the Interstate Commerce Commission not to be judicially reviewable under the procedure of the Urgent Deficiencies Act. The *Shields Case* was a proceeding to restrain the United States Attorney for the District of Utah from prosecuting any proceeding for penalties based upon alleged violations of the Railway Labor Act. There is this fundamental difference between the *Shields Case* and the *Utah Fuel Case*. In the *Shields Case* there was no provision in the Railway Labor Act for a judicial review of the "determinations" of the Interstate Commerce Commission, and the procedure under the Urgent Deficiencies Act had been held not to be available for such judicial review. Therefore, unless the remedy by injunction was permitted, there could be no judicial review of any kind so far as Interstate Commerce Commission "determinations" are concerned. That, however, is not the case here. The Bituminous Coal Act of 1937, by Section 6 (b), provides a method for reviewing such orders of the Coal Commission as are generally judicially reviewable, *i.e.*, final orders. As noted above, this Court, in *United States* v. *Illinois Central R. Co.*, 244 U. S. 82, and in other cases, has held preliminary, procedural orders of administrative agencies not to be judicially reviewable.

It is suggested, therefore, that the *Shields Case* is not a precedent for the reversal of the United States Court of Appeals for the District of Columbia in the present case.

3. The Remedy Provided by Section 6 (b) of the Bituminous Coal Act of 1937 to Persons Aggrieved by Its Operation is Exclusive.

It is apparent from an examination of the Coal Act that Congress intended to strictly limit litigation arising out of proceedings before the Coal Commission, and to minimize, so far as possible, the delays that might retard the Coal Commission in the performance of its duties, since it provided, in Section 6 (b), for a statutory review by the United States Court of Appeals for the District of Columbia, or any United States Circuit Court of Appeals, of "an order issued by the Commission in a proceeding to which such person is a party." The Congress having provided for a procedure for reviewing such orders of the Coal Commission as are judicially reviewable, the statutory remedy is exclusive. *Securities and Exchange Commission* v. *Andrews*, 88 F. (2d) 441; *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission*, 93 F. (2d) 236, 68 App. D. C. 77; *Sykes* v. *Jenny Wren Co.*, 78 F. (2d) 729, 64 App. D. C. 379; *Monacacy Broadcasting Co.* v. *Prall*, 90 F. (2d) 421; *Jones* v. *Securities and Exchange Commission*, 79 F. (2d) 617.

4. The Bituminous Coal Act of 1937 Should be so Construed as to Avoid Doubts as to Its Constitutionality.

This Court many years ago laid down the rule that it is bound to construe a statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407. That rule has only recently been reaffirmed. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1.

5. If the Bituminous Coal Act of 1937 be Ambiguous, Doubts Should be Resolved in Favor of Its Construction by the National Bituminous Coal Commission, the Administrative Agency Charged With Its Enforcement.

Construction of a doubtful or ambiguous statute by officials charged with its administration, generally speaking, will not be judicially disturbed except for reasons of great weight. *McCaughn* v. *Hershey Chocolate Company,* 283 U. S. 488; *Spring City Foundry Company* v. *Commissioner of Internal Revenue,* 292 U. S. 182. These are but a few of the many decisions of this Court sustaining this proposition. In the determination of the issues involved in this case, therefore, any doubt with respect to the meaning of the statute, if it be held to be ambiguous, should be resolved in favor of its construction by the National Bituminous Coal Commission, the agency charged with its enforcement.

6. The Bituminous Coal Act of 1937 Cannot be Administered Consonant With Well Established Principles of Constitutional Law if the Injunction Prayed for by Petitioners is Granted.

A.—*The statutory duty of the Coal Commission.*

The preamble of the Coal Act describes its objective by a recitation of the evils sought to be overcome by it. It reads as follows:

> "That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

To effectuate the purpose of the Act, the Commission is required, by Section 4, to establish minimum prices for bituminous coal. To do this, three distinct steps are provided for. The Commission must first determine the weighted average cost of production in each of the Minimum Price Areas specified in the Act. The basis for these cost determinations are data secured by the Commission from the producers concerning costs of production, preparation, sale and distribution of bituminous coal. It is the use of these reports that is in issue here. These reports are furnished originally to the Statistical Bureaus of the Commission, in each District. From these reports the Statistical Bureaus transmit determinations of costs to the District Boards. The District Boards are required to determine the total cost of the ascertainable tonnage produced in their Districts for the calendar year 1936, with adjustments to give effect to changes since that time substantially affecting costs. The determinations of the District Boards are transmitted to the Commission, and the Commission determines the weighted average of the total costs for each Minimum Price Area. The District Boards are then required to submit proposed minimum prices and marketing rules and regulations. After these have been approved by the Commission, the prices must be coordinated in the common consuming markets, so as to meet the standards specified by the Act. If the District Boards are unable to coordinate the prices, the Commission will perform this task.

B.—*The necessity for a hearing.*

Section 2 (a) of the Coal Act provides that:

> "No order which is subject to judicial review . . ., and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact."

In addition to the statutory requirement for a hearing, there is the necessity for according the fair hearings required by the Fifth Amendment to the Constitution of the United States.

The Coal Commission is a body with power to ordain, and to issue orders that impinge upon legal rights, and is different from a tribunal, like the Tariff Commission, which has only the power to advise. Such an agency must, therefore, "pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action." *Wichita Railroad & Light Co.* v. *P. U. Comm. of Kansas,* 260 U. S. 48, 50. This hearing must be accorded before minimum prices are established. *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190; *Chicago, M. & St. P. Ry. Co.* v. *Minnesota,* 134 U. S. 418.

C.—*The constitutional requirements of a fair hearing.*

Since both the Coal Act and the Fifth Amendment to the Constitution require a hearing prior to the establishment of minimum prices, it follows that such a hearing must have the elements of a "fair hearing," as defined by this Court. The statute, Section 2 (a), specifically requires public notice, and opportunity to interested parties to be heard, and findings of fact. Thus, an interested party must be allowed to introduce evidence of his own, as well as to cross-examine opposing witnesses. In *Interstate Commerce Commission* v. *Louisville & N. R. Co.,* 227 U. S. 88, this Court said:

> "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."

The Coal Commission cannot use the cost data in its possession unless it places such data in evidence during the course of the hearings, or makes them available to interested parties for testing and refutation as basic evidence.

United States v. *Baltimore & Ohio S. W. Ry. Co.,* 266 U. S. 14.

Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88.
Wichita Railroad & Light Co. v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48.
United States v. *Abilene & Southern Ry. Co.*, 265 U. S. 274.
Morgan v. *United States*—I, 298 U. S. 468.
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38.
Morgan v. *United States*—II, 304 U. S. 23.

With this constitutional requirement there can be "no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay." *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292.

Annual reports of carriers and tariffs filed by the carriers with the Interstate Commerce Commission are public records, made so by the Interstate Commerce Act, and, therefore, open to public inspection. Yet, the Interstate Commerce Commission, under the decisions of this Court, cannot use these reports in a case unless they are made a part of the record, being introduced in evidence, according to the Rules of Practice of the Commission. Evidence introduced in Interstate Commerce Commission cases in tabular form must be supported by a witness available for cross-examination who is familiar with the underlying data upon which it is based. *American Book Co.* v. *Baltimore & Ohio R. Co.*, 179 I. C. C. 650. If the Interstate Commerce Commission cannot use public reports in the determination of its cases without their being introduced in evidence, certainly the Coal Commission cannot use secret data in the fixing of minimum prices, but must disclose the basic data upon which such prices are fixed, namely, producers' cost reports.

The situation, therefore, resolves itself into this: The Commission cannot perform the statutory duties imposed upon it unless the production cost reports of the producers are introduced in evidence at a hearing held by the Com-

mission, or are made available for inspection by interested parties.

The minimum prices of bituminous coal as originally established by the National Bituminous Coal Commission were vacated and set aside as a result of the decision of the United States Court of Appeals for the District of Columbia in *Saxton Coal Mining Company* v. *National Bituminous Coal Commission,* and allied cases, 96 F. (2d) 517, by reason of the fact that the Commission established those prices without according the hearing required by the statute and the Constitution. Throughout the hearings since initiated, and now in progress, looking to the establishment of minimum prices for bituminous coal, these railroads, as large consumers of bituminous coal, have insisted that they be accorded their constitutional and statutory rights of having the data upon which the minimum price orders will be based placed in the record, or otherwise made available to them. In other words, these railroads have throughout the proceedings insisted that the prices be fixed upon data submitted on top of the table and not under the table.

In addition to meeting and complying with the constitutional requirements, the Coal Commission has a very practical task in the establishment of minimum prices, as required by the Coal Act. The Coal Act is an attempt on the part of Congress to stabilize the bituminous coal industry, and, perhaps, goes further by way of experimentation in Government-industry relationship than any other statute. To be successfully administered, it must be so interpreted and applied as to assure not only the protection of the public but the confidence of the public, both as producers and as consumers of bituminous coal. If minimum prices are to be established on the basis of secret data, with no opportunity on the part of the public to examine and check the bases of the price structure, it can hardly serve to inspire the confidence of the public. It is, therefore, consistent with public policy that the individual verified cost reports of bituminous coal producers be made public at the hearings,

so as to enable them to be checked by interested parties of record in the proceedings. While Congress intended to protect the consumer from the establishment of unreasonably high minimum prices, at the same time it intended that the coal industry have reasonable minimum prices established for it. Under these circumstances, it can hardly be assumed that Congress intended to have secret data used, because that would be fair neither to the producer nor to the consumer, even if it were constitutionally possible.

If the injunction prayed for by the Petitioners is granted, it would seem to follow, both as a legal fact and an economic fact, that the Coal Act cannot be successfully administered by the Coal Commission.

7. Congress Had Power to Authorize the Coal Commission to Make Public at a Hearing the Individual Verified Cost Reports of Producers of Bituminous Coal.

This Court, in *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, seems to have settled the proposition that Congress had the power to authorize the Coal Commission to make public at a hearing the individual verified cost reports of the producers of bituminous coal. The Coal Commission is not merely an advisory body with no power to ordain, but is an administrative agency with power to make orders which take away the property of consumers of bituminous coal, and it must, therefore, act within the requirements of the Constitution. Since it is required to accord a hearing, it is bound to expose the details as well as the summaries. In the *Norwegian Nitrogen Company Case*, this Court, at page 317, said:

> "There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this [Tariff] Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far."

8. Congress Authorized the Coal Commission to Disclose the Individual Verified Cost Reports of Bituminous Coal Producers at a Public Hearing.

That Congress had and exercised the will "to go so far" as to make available to the business rivals of a producer and to the public generally the individual verified cost reports of bituminous coal producers, when so disclosed in evidence in any hearing before the Coal Commission or any Court, seems clear from the language of Section 10 (a) of the Coal Act, which contains this provision:

> "No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is made in evidence in any hearing before the Commission or any Court*, and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so complied, may be published by the Commission." (Emphasis supplied)

Compare the above-quoted provision with that found in Section 10 (a) of the Bituminous Coal Act of 1935 (49 Stat. 991, U. S. C., Title 15, § 801), certain provisions of which were held unconstitutional in *Carter* v. *Carter Coal Co.*, 298 U. S. 238. In the 1935 Act the provision reads as follows:

> "No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, *except where such disclosure is warranted by a controversy with the producer over any order of the Commission*, and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission." (Emphasis supplied)

Thus it will be seen that Congress, in the re-writing of the 1935 Act into the 1937 Act, gave specific attention to this provision of the law. Under the 1935 Act disclosure of production costs was limited to cases where there was a controversy with the producer over any order of the Commission. Under the 1937 Act, however, such information may be disclosed in evidence in any hearing before the Commission or any Court. Although the reports of the Committees of Congress are silent on the subject, yet it must be taken that Congress recognized the necessity for hearings, and the necessity for the introduction of these production cost reports in evidence at such hearings, in order that the Act, and the orders issued under it, may not be constitutionally invalid. Certainly, Congress did not broaden this language with the intent that it should be meaningless.

While, under Section 4-II-(a), individual verified cost reports of producers are required to be held confidential by the *Statistical Bureaus*, the cloak of secrecy is specifically removed by Section 10 (a) of the Act so far as the *Commission* is concerned, when such disclosure is made in evidence in any hearing before the Commission or any Court. It is only by so construing the Act that either the Act or the minimum price orders of the Commission can have the basic constitutional validity.

9. Petitioners Have No Such Property Rights in Cost Reports Filed with the Coal Commission as May Be Protected by Injunction.

When Congress enacted the Coal Act, deciding that the bituminous coal industry is so affected with the public interest as to require regulation, business secrets, as distinguished from "trade secrets" ceased to exist in the bituminous coal industry, and such data as are necessary to be disclosed in order that the Coal Commission may perform its statutory duties had the cloak of secrecy removed, and in removing this secrecy the Congress did not deprive the

producers of any property rights, such as may be protected by injunction. *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294; *Norwegian Nitrogen Products Company* v. *U. S. Tariff Commission*, 6 F. (2d) 491; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541; *Wilson* v. *United States*, 221 U. S. 361; *American Sumatra Tobacco Corporation* v. *Securities and Exchange Commission*, 93 F. (2d) 236. See Note, 29 L. R. A. (N. S.) 716.

Even though Petitioners could show irreparable injury, and the lack of relief therefor, this Court would not be justified in depriving the Coal Commission of its means of performing the statutory duties imposed upon it by Congress. *United States ex rel Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, rehearing denied, 294 U. S. 731; *United States ex rel Kansas City Southern Ry.* v. *Interstate Commerce Commission*, 98 F. (2d) 268; *Procter & Gamble Co.* v. *Coe*, (U. S. Ct. App. D. C.) 96 F. (2d) 518.

It is elemental that injunction will lie only when it is clearly shown that irreparable injury will be done. Since the producers have no property rights in the verified production cost reports, they cannot suffer irreparable injury by the disclosure of such reports by the Coal Commission. To the extent that any coal producer is prejudiced competitively by the disclosure of the production cost reports it is a case of *damnum absque injuria*. It is a well-settled rule of law that acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria*.

VI.

CONCLUSION.

It is respectfully suggested that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

CLARENCE A. MILLER,
Counsel for
Aberdeen and Rockfiish Railroad Company, et al.,
As Amici Curiae;
Office and Post-Office Address:
1120 Tower Building,
1405 K Street, N. W.,
Washington, D. C.

December 30, 1938.

APPENDIX A.

List of Railroads for Which This Brief is Filed.

Aberdeen and Rockfish Railroad Company..North Carolina
Alabama Central Railway .....Alabama
Arcade and Attica Railroad Corporation .....New York
Arkansas Railroad Company ..... Arkansas
The Atlantic and North Carolina Railroad Company.....North Carolina
Augusta Railroad Company .....Arkansas
Bath and Hammondsport Railroad Company....New York
Belfast and Moosehead Lake Railroad Company....Maine
Bellefonte Central Railroad Company.....Pennsylvania
Bingham and Garfield Railway Company.....Utah
Birmingham Southern Railroad Company .....Alabama
Bonhomie and Hattiesburg Southern Railroad Company .....Mississippi
Buffalo, Union-Carolina Railroad .....South Carolina
Butte, Anaconda & Pacific Railway Company....Montana
Canton Railroad Company .....Maryland
Chattahoochee Valley Railway Company .....Alabama
Georgia
Chesapeake Western Railway .....Virginia
Chicago and Calumet River Railroad Company....Illinois
Chicago Short Line Railway Company .....Illinois
The Clarendon and Pittsford Railroad Company..Vermont
Collins & Glennville Railroad Company .....Georgia
The Dansville and Mount Morris Railroad Company ..... New York
DeKalb & Western Railroad Company .....Mississippi
Detroit, Caro and Sandusky Railway Company...Michigan
East Tennessee and Western North Carolina Railroad Company .....Tennessee
East Washington Railway Company .....Maryland
Flemingsburg and Northern Railroad Company..Kentucky
Flint River and Northeastern Railroad Company..Georgia
Fonda, Johnstown and Gloversville Railroad Company (J. L. Hees, Trustee) .....New York
Fort Smith, Subiaco & Rock Island Railroad Company .....Arkansas
Gainesville Midland Railway (Gordon C. Carson and W. B. Veazey, Receivers) .....Georgia
Genesee and Wyoming Railroad Company .....New York

Georgia, Ashburn, Sylvester & Camilla Railway Company ..... Georgia
The Georgia Northern Railway Company ..... Georgia
The Georgia Southwestern and Gulf Railroad Company (W. M. Legg, Receiver) ..... Georgia
Greenville and Northern Railway Company. South Carolina
High Point, Thomasville & Denton Railroad Company ..... North Carolina
Kishacoquillas Valley Railroad Company.... Pennsylvania
Lake Erie, Franklin & Clarion Railroad Company ..... Pennsylvania
Lancaster and Chester Railway Company.. South Carolina
The LaSalle and Bureau County Railroad Company ..... Illinois
Laurinburg and Southern Railroad Company ..... North Carolina
Ligonier Valley Rail Road Company ..... Pennsylvania
Louisville, New Albany & Corydon Railroad Company ..... Indiana
Manistee and Northeastern Railway Company... Michigan
Marinette, Tomahawk & Western Railroad Company ..... Wisconsin
Maryland and Pennsylvania Railroad Company.. Maryland
Pennsylvania
Midland Continental Railroad ..... North Dakota
Minneapolis, Northfield and Southern Railway ..... South Dakota
Minnesota Western Railway Company..... Delaware
Mississippi & Skuna Valley Railroad Company. Mississippi
Mississippi Export Railroad Company..... Mississippi
Montana, Wyoming & Southern Railroad Company ..... New Jersey
Morehead and North Fork Railroad Company.. New Jersey
The Narragansett Pier Railroad Company... Rhode Island
Nezperce & Idaho Railroad Company ..... Idaho
Okolona, Houston and Calhoun City Railway Company ..... Mississippi
Oneida & Western Railroad Company..... Tennessee
Pickens Railroad Company ..... South Carolina
Pittsburgh, Allegheny & McKees Rocks Railroad Company ..... Pennsylvania
The Pittsburgh & West Virginia Railway Company ..... Pennsylvania
West Virginia

Port Huron and Detroit Railroad Company.....Michigan
The Prattsburgh Railway Corporation .....New York
The Prescott & Northwestern Railroad Company.Arkansas
Pullman Railroad Company .....Illinois
Rahway Valley Company (Rahway Valley Company, Lessee) .....New Jersey
Rock Port, Langdon & Northern Railway Company .....Missouri
Savannah and Atlanta Railway (Charles E. Gay, Jr., and D. G. Fogarty, Trustees) .....Georgia
Suncook Valley Railroad .....New Hampshire
Susquehanna and New York Railroad Company .....Pennsylvania
Tennessee, Alabama and Georgia Railway .....Georgia
Tennessee & North Carolina Railway Company..Tennessee
North Carolina
Tennessee Railroad Company .....Tennessee
Virginia and Carolina Southern Railroad Company .....North Carolina
Ware Shoals Railroad Company.....South Carolina
Wichita Northwestern Railway Company (T. A. Fry, Receiver) .....Kansas

P 3

SUPREME COURT OF THE UNITED STATES.

No. 528.—October Term, 1938.

Utah Fuel Company, Independent Coal and Coke Company, Liberty Fuel Company, et al., Petitioners, *vs.* National Bituminous Coal Commission, et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 30, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioners are producers—engaged in the business of mining coal, and members of the "Bituminous Coal Code",—that is "producers accepting membership in the Code." The National Bituminous Coal Commission, created by Act April 26, 1937 (Ch. 127, 50 Stat. 72), purporting to proceed under section 10(a), on July 15, 1937 issued Order No. 15 which directed each producer of bituminous coal to file within fifteen days complete report showing for each mine detailed cost of tonnage produced and realization prices derived from sale, during 1936. This notice concluded—

"The Commission directs specific attention to the provisions of Section 10 of said Act relating to the confidential nature of the reports required under this order and further gives notice that the penalties provided for non-compliance with this order by the producer will be strictly enforced."

Approved forms were distributed to producers for returns to the order. They contained the following in bold type—"This report is required under the provisions of the Bituminous Coal Act of 1937 and is therefore confidential." Petitioners made returns upon these forms.

March 30, 1938, the Commission announced that thereafter it would give public notice of a hearing to determine the weighted average of total cost of the tonnage of coal in the calendar year 1936 adjusted, etc. Further, that upon such hearing the information obtained from individual coal producers through Order 15 would be made available for inspection and introduction in evi-

dence; that section 10(a) of the Act was construed to authorize such disclosure.

Petitioners made formal objection to the March 30 action but the Commission after consideration announced adherence and ordered—

"That the Secretary of the Commission be and he is hereby directed to cause the individual cost returns of the producers, as above described, to be made available for inspection by interested parties in the final hearing in the establishment of minimum prices and marketing rules and regulations, so that the same will be available for introduction in evidence if and when required."

Deeming this proposed action unauthorized and relying upon section 6(b) of the Act, one of the present petitioners with others asked review in the Court of Appeals, District of Columbia. That court held the challenged action was not reviewable by it and dismissed the petition August 1, 1938. *Mallory Coal Co.* v. *National Bituminous Coal Commission*, 99 F. (2d) 399. August 31, 1938, the Commision ordered its secretary to make available for inspection to "interested parties who have filed appearances in this proceeding," petitioners' cost, etc., reports returned under Order 15.

September 7, 1938 petitioners by bill filed in the District Court, District of Columbia, sought an injunction against the threatened disclosure. This set out the foregoing facts, stated that no adequate relief could be had elsewhere, and that petitioners would sustain immediate and irreparable damage if their reports were publicized. It further averred that the Commission's proposed action was unauthorized, arbitrary, unreasonable, and in flagrant violation of the statute also the promise of privacy inferable from Order 15 and the forms used for returns thereto.

The trial court held "the bill of complaint fails to state a cause of action in that the acts of the defendants sought to be enjoined are authorized by and not in violation of the Bituminous Coal Act," and dismissed it upon motion. The Court of Appeals concluded the District Court had no jurisdiction over the controversy and upon that ground approved the dismissal. The matter is here by certiorari.

We are unable to accept the view of the Court of Appeals. The District Court correctly ruled that the bill fails to state a cause of action and for that reason properly directed the bill dismissed.

A question cognate to the one here presented was before us in *Shields* v. *Utah Idaho Central Railroad Co.*, (— U. S. —), decided December 5, 1938, the date of the Court of Appeals' decision herein. We there declared, although determination by the Interstate Commerce Commission that a railroad was not "interurban" did not constitute an "order" reviewable under the Urgent Deficiencies Act of October, 1913,[1] nevertheless, in the circumstances disclosed, it could be subjected to judicial review by bill in equity. "Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions."

Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity. The jurisdiction of a District Court is to be "determined by the allegations of the bill, and usually if the bill or declaration makes a claim that if well founded is within the jurisdiction of the Court it is within that jurisdiction whether well founded or not." *Hart* v. *B. F. Keith Vaudeville Exchange, et al.*, 262 U. S. 271, 273; also *Binderup* v. *Pathe Exchange, Inc., et al.*, 263 U. S. 291, 305; *United States* v. *Archibald McNeil & Sons*, 267 U. S. 302, 307.

By admission, Congress could have authorized the Commission to disclose the details of reports concerning costs, etc. But petitioners insist that the Bituminous Coal Act conferred no such power; on the contrary definitely denies it.

The Act contains twenty-one sections and a schedule of districts. Section 4—"The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code', and are herein referred to as the code." "Part II—Marketing" of this declares—

"The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as

[1] 38 Stat. 208, 28 U. S. C. 41.

the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. . . ."

Section 10(a)—

"The Commission may require reports from producers and may use such other sources of information available as it deems advisable, and may require producers to maintain a uniform system of accounting of costs, wages, operations, sales, profits, losses, and such other matters as may be required in the administration of this Act. No information obtained from a producer disclosing costs of production or sales realization shall be made public without the consent of the producer from whom the same shall have been obtained, except where such disclosure is made in evidence in any hearing before the Commission or any court and except that such information may be compiled in composite form in such manner as shall not be injurious to the interests of any producer and, as so compiled, may be published by the Commission."

Counsel submit an ingenious argument to show that as petitioners are code members their returns to Order 15 are not within the ambit of section 10 and must be treated as if presented under Section 4, Part II(a) and therefore confidential. Also, that the challenged action of the Board conflicts with the words, spirit and general purposes of the enactment.

We have examined the argument but cannot conclude that the reasons advanced are adequate to support the point taken.

The language of section 10(a) applies to all producers and we think allows what the Board proposes. It harmonizes rather than conflicts with the general purposes of the statute to permit action by the Board only upon full information. Obviously publication may be harmful to petitioners but as Congress had adequate power to authorize it and has used language adequate thereto we can find here no sufficient basis for an injunction.

Upon the ground and for the reasons herein stated the decree of the District Court is affirmed.

Mr. Justice BLACK, concurring.

I concur in the affirmance of the decree of the District Court. For reasons stated in the opinion of the Circuit Court of Appeals,[1] I believe that Court properly found the District Court without jurisdiction.

---

1 — F. 2d —.